United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

To Be Argued By
ROY E. POMERANTZ

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-7183

B
P/S

SAMUEL CHANEYFIELD,

Plaintiff-Appellant,

-against-

THE CITY OF NEW YORK and MATHEWS & CHASE,

Defendants-Appellees.

BRIEF SUBMITTED ON BEHALF OF
DEFENDANT-APPELLEE MATHEWS & CHASE

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BRIEF ON BEHALF OF DEFENDANT-APPELLEE MATHEWS & CHASE

STATEMENT

This is an appeal by plaintiff-appellant from a judgment entered February 26, 1975 in the United States District Court, Southern District of New York, dismissing the complaint of plaintiff-appellant against the defendants, and from a memorandum order dated March 21, 1975, filed March 26, 1975, denying a motion for re-argument.

An amended notice of appeal was served by plaintiff-appellant so as to include both appeals in this proceeding.

STATEMENT OF FACTS

Plaintiff-appellant is an Operating Engineer who claims to have sustained injuries in an accident on September 13, 1971 (App., 15a, 21a).

At the time of the accident the plaintiff-appellant was operating the drive vehicle of several cars which run on tracks designed to assist in the removal of rock from a certain sewer being constructed in the County, City and State of New York between West 50th Street and West 179th Street, such sewer being a part of the sewage system of the City of New York (App., 17a, 20a). It is claimed that a coupler between two of the cars disengaged (App., 20a-22a).

Defendant City of New York is alleged to be the owner of the sewage system (App., 20a-21a), and defendant Mathews & Chase is claimed by plaintiff-appellant to be a consulting engineer engaged by the City of New York "to check over and review the plans and specifications for the tunneling operations..." (App., 20a, 32a).

PRIOR PROCEEDINGS

An action was commenced by plaintiff-appellant in the Supreme Court of the State of New York, County of Bronx, against numerous defendants, inclusive of Mathews & Chase,

one of the defendants in this action. In the action pending in the state court, plaintiff failed to include the City of New York as a party defendant, but asserted the liability of Mathews & Chase, as consulting engineer, deriving from its consulting contract with the City of New York with respect to the construction of the aforesaid sewage system (App., 27a-39a, particularly 32a-33a).

Following the commencement of that action, plaintiff commenced the instant action in the United States District Court for the Southern District of New York, naming as defendants The City of New York and Mathews & Chase, seeking to establish an action for damages pursuant to the Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C., Section 731, et seq.

Defendant Mathews & Chase moved to dismiss the complaint on the ground that the court lacked jurisdiction and on the ground that no cause of action existed against Mathews & Chase under the Federal Metal and Non-Metallic Mine Safety Act.

Following a hearing with respect to that motion, the relief sought by Mathews & Chase was granted, and the Court, on its own motion, dismissed the action as against defendant The City of New York.

The memorandum decision and order of United States District Judge Richard Owen noted that the sewage system in

which plaintiff was working was not a "mine" within the meaning of the Federal Metal and Non-Metallic Mine Safety Act; that the said Act did not provide for a private right of action; and that Mathews & Chase was not an "operator" within the meaning of the Act.

Following service of a notice of appeal from that decision, plaintiff-appellant moved for re-argument, and requested leave to amend the complaint so as to bring the plaintiff-appellant's cause of action under the Federal Employers' Liability Act, 45 U.S.C., Section 51. Such request was not made in the opposition papers to the notice of motion to dismiss.

United States District Judge Richard Owen denied the motion for re-argument.

STATEMENT OF ISSUES PRESENTED

1. Does the Federal Metal And Non-Metallic Mine Safety Act apply to the sewage system of the City of New York?

2. Is a consulting engineer retained to ascertain that a sewage project, during construction, conforms to plans, designs and specifications, an "Operator" as defined in the Federal Metal And Non-Metallic Mine Safety Act?

3. Does the Federal Metal And Non-Metallic Mine Safety Act create a right of action to an injured person?

4. Is the New York City Sewage System a railroad as defined in the Federal Employers' Liability Act?

5. Is service of process under the Federal Rules of Civil Procedure proper on an employee of a partnership who is not the managing agent of such partnership?

POINT I

THE UNITED STATES DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT OF PLAINTIFF

A) The Federal Metal And Non-Metallic Mine Safety Act Does Not Provide For A Private Right Of Action

Plaintiff-appellant, who had already commenced an action against Mathews & Chase in the Supreme Court of the State of New York, County of Bronx, sought to protect his right of action by commencing a companion action in the United States District Court, Southern District of New York, and chose the Federal Metal and Non-Metallic Mine Safety Act, 20 U.S.C., Section 731, et seq, as the vehicle for such action.

As is made clear from the pleading filed by plaintiff-appellant in this action, and from the pleading filed by plaintiff-appellant in the companion state court action, plaintiff Samuel Chaneyfield, while in the course of his employment, was caused an injury when a coupling device used to couple "muck cars" apparently disengaged, permitting certain of those cars, while descending a decline along the track on which they were travelling to come into contact with the engine car operated by Mr. Chaneyfield.

The pleading further makes clear that Mr. Chaneyfield is an "Operating Engineer", a category of construction employee well known in the construction industry in New York. Mr. Chaneyfield was engaged in the construction of a sewage

system being constructed on the west side of Manhattan, which sewage system, of necessity, involved a tunneling operation.

The Federal Metal and Non-Metallic Mine Safety Act was, of course, enacted to afford the United States Government authority and jurisdiction to promote safety in the mines which fall within the Act. The Act empowers the Secretary of the Interior to conduct investigations of mines in order to obtain information relating to health and safety conditions and to develop, promulgate and enforce health and safety standards. 1966 U.S. Code Cong. and ADM news, p.2846. The Act further provides, pursuant to Section 727, that the Secretary of the Interior, or an authorized representative, may issue an order requiring the operator of a mine to cause all persons, except those specified, to be withdrawn and barred from entering a mine in a situation of danger. In the event that a violation of one of the mandatory standards promulgated by the Secretary of the Interior is not corrected, then the Secretary or an authorized representative is empowered to make an order barring all persons from the mine.

It is noted that Section 733 is the only section of the Act which relates to penalties. Such section states as follows:

> "§733. Penalties for violations; civil and criminal Liability
>
> (a) Whenever an operator (1) violates or fails or refuses to comply with any order of withdrawal and debarment issued under section 727 or

section 728 of this title, or (2) interferes with, hinders, or delays the Secretary, or his duly authorized representative, in carrying out his duties under this chapter, or (3) refuses to admit an authorized representative of the Secretary to any mine which is subject to this chapter, or (4) refuses to permit the inspection or investigation of any mine which is subject to this chapter, or of an accident, injury or occupational disease occurring in or connected with such a mine or (5) being subject to the provisions of section 732 of this title, refuses to furnish any information or report requested by the Secretary, a civil action for preventive or temporary injunction, restraining order, or other order, may be instituted by the Secretary in the district court of the United States for the district in which the mine in question is located or in which the mine operator has its principal office.

(b) Whoever violates or fails or refuses to comply with an order of withdrawal and debarment issued (1) under subsection (a) of section 727 of this title or (2) under subsection (b) of section 727 of this title if the failure to comply with an order of abatement has created a danger that could cause death or serious physical harm in such mine immediately or before the imminence of such danger can be eliminated, shall upon conviction thereof be punished for each such offense by a fine of not less than $100, or more than $3,000, or by imprisonment not to exceed sixty days, or both. In any instance in which such offense is committed by a corporation, the officer or authorized representative of such corporation who knowingly permits such offense to be committed shall, upon conviction, be subject to the same fine or imprisonment, or both."

That Congress had the authority to create a private civil cause of action is beyond dispute. That it did not create such a private cause of action by reason of a violation of the provisions of the Act is also beyond dispute.

Nothing in the Act, expressly or by implication, grants to any injured miner a new cause of action beyond those elsewhere found at law.

For this reason, no cause of action at law exists in favor of plaintiff-appellant pursuant to the Federal Metal and Non-Metallic Mine Safety Act.

B) Even If A Private Cause Of Action Existed In Favor Of Plaintiff, The Provisions Of The Act Do Not Apply To The Sewage System In Which Plaintiff Was Working At The Time Of The Occurrence

At the outset, defendant Mathews & Chase wishes to advise the Court that it recognizes the need for safety stressed at length in the brief of plaintiff-appellant before this Court. Nevertheless, though safety is of great public concern and interest, that criteria alone is not determinative of the issues here presented.

In order to construct an alleged cause of action under the terms of the Act, plaintiff-appellant notes that the rock, muck and debris removed from the sewage system being constructed in Manhattan was sold by unidentified parties in the State of New Jersey. By so asserting, plaintiff-appellant seeks to have the Court designate the New York City Sewer System as a mine operating in interstate commerce, so as to afford jurisdiction. In essence, plaintiff-appellant asserts that since the sewage system involved a tunneling operation

requiring the removal of waste materials, and as such waste materials were non-organic in nature, and were sold other than in the State of New York, the sewage system became a mine within the meaning of the Federal Metal and Non-Metallic Mine Safety Act.

Apart from asserting that Congress acted to promote safety, plaintiff fails to demonstrate any intention by Congress that the scope of the Act was to include anything other than commercial mine operations which, by their nature, remove ore and similar materials for the very purpose of transporting them into interstate commerce.

The adoption of the interpretation of the Act sought herein by plaintiff-appellant would, in effect, place under Federal jurisdiction virtually any excavation operation in the construction industry if the removed materials would ultimately move into interstate commerce, even if such interstate movement related solely to the dumping of such materials in a State other than that from which the materials have been extracted. Indeed, the interpretation sought by plaintiff-appellant would place within the scope of the Act, for example, the excavating of underground basement corridors between buildings of an apartment complex if the rocks removed in the excavating of the foundation were removed to another jurisdiction.

As Congress did not expressly define what was meant by it as respects a definition of "mine", it is respectfully

submitted that this Court should adopt an interpretation most clearly in conformity with the apparent intention of Congress. It is respectfully submitted that such intention related to the promotion of safety in the mining industry, and support is found for this proposition in the vesting in the Bureau of Mines of the Department of the Interior of the general responsibility for carrying out the purposes of the Act.

C) Mathews & Chase Is Not A Mine Operator Within The Definition In The Federal Metal And Non-Metallic Mine Safety Act

Plaintiff-appellant, in conclusory terms, asserts that Mathews & Chase, a consulting engineer, becomes an "operator" of the operation by reason of its alleged supervisory responsibilities as consulting engineer to the City of New York with respect to certain aspects of the sewage system.

As noted above, Mathews & Chase respectfully disagrees that the sewage system is a mine within the meaning of the Act.

Even if New York City's sewage system was a mine, nevertheless, Mathews & Chase would not be an operator of that mine. Section 721 of the Federal Metal and Non-Metallic Mine Safety Act provides, inter alia, as follows:

> "(c) The term "operator" means the person, partnership, association, or corporation, or subsidiary of the corporation operating

> a mine, and owning the right to do so, and includes any agent thereof charged with responsibility for the operation of such mine."

In order to create a sustainable cause of action, plaintiff-appellant generally asserts that Mathews & Chase had certain supervisory obligations, with particular reference to an obligation to see that the construction of the sewage system conformed to the plans and specifications. Plaintiff-appellant thus concludes that the supervisory duty of Mathews & Chase, so limited, thus renders Mathews & Chase to be an "operator" of a mine, as an "agent...charged with the responsibility for the operation of such mine." Ingenious as such theory might be, it is nevertheless difficult to imagine that Congress, in defining "operator", intended anything other than to give the Secretary of the Interior jurisdiction, within the scope of the Act, over those general agents retained by a mine owner with the actual operation of the mine, as a mine. The term "operator" as defined in the Act, extends the authority of the Secretary of the Interior to individuals or corporate engineers who actually admnister mining operations for owners thereof.

Plaintiff-appellant provides no legislative history indicating any intention on the part of Congress that consulting engineers retained to insure that construction conforms to plans, designs and specifications should be deemed to be operators of a mining facility. It is respectfully

submitted that absent the showing of such intent, this Court should not hold that the Act be given the breadth and scope asserted by plaintiff-appellant.

D) The District Court, In Granting The Initial Dismissal And Judgment, Properly Declined To Permit An Amendment Of The Pleadings

The Appendix upon which this appeal is prosecuted establishes that no request was made by plaintiff, in opposition to the motion to dismiss, for leave to amend the complaint. The affidavit of William J. Corcoran duly sworn to the 19th day of February, 1975 (App., 64a-69a), is entirely devoid of any request, express or by implication, that plaintiff, in the event of the granting of the dismissal, be permitted to amend the complaint under any theory of law.

That affidavit makes clear that plaintiff wished to have the complaint upheld on the ground that the sewer tunnel was a "mine", that the removal of the rock known as "Manhattan Schist" constituted the removal of minerals, and that its removal by truck to New Jersey constituted interstate commerce within the meaning of the Act.

The Appendix reveals that it was only in support of the motion for re-argument that plaintiff sought to base jurisdiction on the Federal Employers' Liability Act, 45 U.S.C. Section 51, et seq.

For all of the above reasons, it is respectfully submitted that the Court below properly dismissed the complaint of plaintiff, without granting leave to amend, with respect to the initial motion, as (1) no private right of action exists in favor of plaintiff-appellant; (2) the sewage system of the City of New York is not a mine under the Federal Metal and Non-Metallic Mine Safety Act; (3) Mathews & Chase is not a mine operator within the meaning of the Act; and (4) plaintiff had not yet come upon the theory that the sewer was a railroad operation, and did not request leave to so assert.

POINT II

THE UNITED STATES DISTRICT COURT PROPERLY DENIED THE MOTION FOR RE-ARGUMENT

Following dismissal of the plaintiff's complaint, plaintiff served a notice of appeal dated March 10, 1975. Subsequently, plaintiff served a notice of motion for re-argument pursuant to Rule 9(m), which motion was dated March 11, 1975.

It is said that the filing of a notice of appeal from a District Court to the Court of Appeals has the effect of immediately transferring jurisdiction from the District Court to the Court of Appeals with respect to any matters involved in the appeal. See Moore's Federal Practice, Volume 9, Section 203.11. Following the filing of a notice of appeal, the District Court is said to be without power to vacate a judgment, or to allow the filing of an amended pleading. Miller v. United States, 114 F.2d 267 (Court of Appeals, 7th Cir., 1940), cert. denied, 313 U.S. 591 (1941); Brasion v. United States, 229 F.2d 176 (Court of Appeals, 10th Cir., 1955).

Even if this were not so, the denial of the application made by plaintiff-appellant for leave to serve an amended pleading so as to assert the liability of the defendants pursuant to the provisions of the Federal Employers' Liability Act, 45 U.S.C., Section 51, et seq., without setting forth the manner in which plaintiff sought to assert the liability of the defendants, was, at the least, understandable. No pro-

posed amended complaint was submitted to the court, nor did the affidavit of William J. Corcoran, Esq., sworn to March 11, 1975, seek to propose a theory pursuant to which either of the defendants would fall within the jurisdiction of the Federal Employers' Liability Act.

It was apparently clear to the United States District judge that the motion, to the extent that it sought leave to amend the complaint, was a mere device whereby plaintiff-appellant could seek to retain Federal jurisdiction.

Despite the applicability of the Federal Employers' Liability Act not having been brought before the Court, the United States District Court denied the motion for re-argument. It would appear that such denial may have been based, in part, on the patent fact that the cars used to remove the rock and debris from the New York City Sewage System are not a "common carrier by railroad" as that term was meant to be applied in 45 U.S.C., Section 51. The Supreme Court has held that "common carrier by railroad" was meant to relate to those who operate a railroad as a means of carrying for the public, a railroad company acting as a common carrier. Edwards v. Pacific Fruit Exp. Co., 390 U.S. 538 (1968).

Moreover, it was likely clear to the court below that the sale by certain unidentified parties of the rock material removed from the sewage tunnel was not sufficient,

within the meaning of the Federal Employers' Liability Act, to constitute engagement in interstate commerce. In McCluskey v. Marysville & N. Ry. Co., 243 U.S. 36 (1917), the Supreme Court held, in a similar situation, that a logging road over which an owner carried its own logs in its own cars from its own timberland to a tide water point within the State was not engaged in interstate commerce even though some of the logs proceeded to points beyond the State.

As respects any proposed amended complaint against defendant Mathews & Chase, there was, with respect to the motion made, a total absence of any showing as to the means by which a consulting engineer could be held liable under the Federal Employers' Liability Act. Indeed, in support of his position that this court should reverse the United States District Court, plaintiff-appellant fails to cite any means by which Mathews & Chase would be subject to the provisions of the Federal Employers' Liability Act.

POINT III

DISMISSAL OF THE PLAINTIFF'S COMPLAINT DOES NOT LEAVE PLAINTIFF WITHOUT A REMEDY

As previously noted, plaintiff has commenced a companion action in the Supreme Court of the State of New York, County of Bronx.

Though the City of New York was not named a defendant in that lawsuit, any of the defendants may, pursuant to the applicable indemnity law, implead the City of New York as third-party defendant. Plaintiff has secured service in jurisdiction over the manufacturer of the car, and has served Mathews & Chase, amongst others.

If, in fact, plaintiff has been caused a personal injury by reason of negligence of any of the defendants in the state court action, then plaintiff has a viable cause of action at common law, which is being vigorously prosecuted.

Under these circumstances, there would appear to be no valid reason, legal or equitable, for this court to permit the plaintiff the use of the federal courts as a means by which to seek a separate adjudication against the defendants herein, through strained interpretations of Federal laws never intended to be applied to situations such as are here at issue.

POINT IV

PLAINTIFF FAILED TO SECURE JURISDICTION OVER DEFENDANT MATHEWS & CHASE THROUGH SERVICE ON MR. SIDNEY PRIVAL

Rule 4(d)(3) of the Federal Rules of Civil Procedure states:

> "4(d) Summons: Personal service. The Summons and Complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary Service shall be made as follows:
>
> ****
>
> (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the Summons and of the Complaint to an officer, a managing or general agent, or to any other agent authorized by appontment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

For effective service under this Rule there must compliance with its provisions, which Mathews & Chase contends is lacking in the instant circumstances. It is noted that the Federal Rules of Civil Procedure also provides for an alternate means of serving those entitites identified in Rule 4(d)(3). Rule 4(d)(7) provides for service to be sufficient upon a defendant if completed in the manner prescribed by the law of the state in which the District Court

sits. In this regard, §310 of the New York Civil Practice Law & Rules (CPLR) provides that personal service on a partnership may be made by personally serving the summons within the state upon any of the partners. In the event that the partners are not within the state, service upon them, or any of them, may be made without the state in the same manner as the service within the state pursuant to §313 of the CPLR. Section 308 of the CPLR provides for alternate methods of service other than personal delivery to the partner to be served.

On September 10, 1974, Sidney Prival was served with the Summons and Complaint filed in this court. As indicated, in the affidavit of Sidney Prival duly sworn to on October 23, 1974, Mr. Prival is not and has never been a partner of the moving defendant, nor is he an employee or agent authorized by appointment or law to receive service of process. Additionally, in recognition of the alternate means of service, as contained in the New York Statutes, the plaintiff has attempted to utilize same by leaving a Summons and Complaint in the instant action at the residence of one of the partners, A.A. Mathews, on October 6, 1974. It is noted that this service was made after Sidney Prival had already been served with the Summons and Complaint in the New York State Court action on August 7, 1974 and in the Federal Court action on September 10, 1974.

For service to be effected under the Federal Rules of Civil Procedure there must be compliance with its provisions. It is conceded that with respect to service upon corporations, courts have held that service may be made upon a managing or general agent which means:

> "Service should be made upon a representative so integrated with the organization that he will know what to do with the papers. Generally, service is sufficient when made upon an individual who stands in such a position as to render it fair, reasonable and just to imply the authority on his part to receive service." American Football League v. National Football League, 27 FRD 264, 269 (D. Md., 1961)

It is similarly conceded that the Federal Rules of Civil Procedure permits service upon a partnership by delivering the Summons and Complaint to a managing or general agent thereof. The issue that is thereby created is whether the person served is, in fact, a managing or general agent. In Taylor v. Granite State Provident Association, 136 N.Y. 343, 346, 32 N.E. 992, 993 (1893), the Court highlighted the narrow guide to be used with reference to these terms. The Court stated that:

> "A managing agent must be some person invested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity and under the direction and control of supervising authority, both in regard to the extent of his duty and the manner of executing it."

It is, therefore, clear that to qualify as a managing or general agent, the person must be in a position of responsibility with discretionary power. In Isaf v. Pennsylvania R.R., 32 A.D.2d 578, 299 N.Y.S.2d 231 (3rd Dept., 1969), service was sought to be made on the defendant at the office of the freight agent in Elmira, New York. The "Chief Clerk" of that office volunteered to accept service inasmuch as the freight agent was not in at the time. Upon the immediate return of the freight agent, the "Chief Clerk" presented him with the Summons which was then sent to the railroad's general counsel. Based upon the foregoing, the Appellate Division set aside this service on the ground that a managing or general agent was not served. The court found that none of the clerk's responsibilities required judgment or discretion which were of a necessity.

It is furthermore submitted that it needs little citation to state the proposition that service upon a person not connected with the partnership or corporation would not be proper. Gordon v. International Tel. & Tel. Corp., 273 F. Supp. 164 (N.D., Ill., 1967). In the instant circumstances, the person upon whom delivery of the Summons and Complaint was made, was neither a partner, employee, managing or general agent, nor agent designated to receive process on behalf of the moving defendant Mathews & Chase. By virtue of the fact that the partners of Mathews & Chase are non-residents of the

State of New York, it cannot be contended that an attempt is being made to evade process inasmuch as this partnership is doing business in the State of New York and therefore subject to the jurisdiction of the court. It is clear that service could therefore have been attempted upon one of the partners pursuant to the New York Civil Practice Law & Rules, which is evidenced by the plaintiff's own actions in the instant action as heretofore indicated. Moreover, a second purported service was made upon Mr. A.A. Mathews on or about October 6, 1974. However, the motion presently before the court relates only to the purported service of September 10, 1974 upon Sidney Prival.

CONCLUSION

For all of the above reasons, it is respectfully submitted that the order dismissing the plaintiff's complaint should be sustained in all respects, and that the order denying plaintiff's motion for re-argument should be sustained in all respects.

Respectfully submitted,

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SERVICE OF 2 COPIES OF THE WITHIN

Appellee's Brief

IS HEREBY ADMITTED.

DATED: 5/29/75

Marisa Giannavelli

Attorney for

SERVICE OF 2 COPIES OF THE WITHIN

Appellee's Brief

IS HEREBY ADMITTED.

DATED: May 29, 1975

Corcoran and Brady

Attorney for Plaintiff-Appellant